In my remarks today, I will discuss how information exchanges are treated under both U.S. and E.U. law, including some of the key cases, the framework under which they are judged, and the FTC's unique ability to challenge certain aspects of this conduct. I will also discuss how the antitrust agencies have addressed benchmarking, a particular type of information exchange.

I.

The Supreme Court has repeatedly held that sharing of price information among competitors, standing alone, is not per se illegal under Section 1 of the Sherman Act.[2] Notably, in the 1925 case of *Maple Flooring Mfrs. Ass'n v. United States*,[3] the Court recognized a "consensus opinion of economists and many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fair price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise."[4] In other words, information about prices, costs, capacity and availability can benefit both producers and consumers, by allowing markets to function more efficiently, intelligently and competitively, at prices and output levels that more accurately reflect changes in supply and demand. The Sherman Act does not forbid producers to operate their businesses as they will, using the best

[2] *See* United States v. Citizens & So. Nat'l Bank, 422 U.S. 86, 113 (1975) ("But the dissemination of price information is not itself a violation of the Sherman Act.") (*citing* United States v. Container Corp., 393 U.S. 333, 339 (1969) (Fortas, J., concurring); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 604-06 (1925); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-83 (1925)).

[3] 268 U.S. 563 (1925).

[4] *Id.* at 582-83.

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Court acknowledged the longstanding concern that the Sherman Act, unlike traditional criminal statutes, does not clearly and precisely identify the unlawful conduct that it proscribes.[11] Instead, the Act is worded in broad and general terms, such that the behavior it proscribes—with the exception of certain species of per se illegal conduct that have "unquestionably anticompetitive effects"—"is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."[12]

Indeed, although the Government had charged the defendants in *Gypsum* with price-fixing, the Court recognized that the underlying c

follow,"[15] from conduct that violates the Act under the Rule of Reason because it is determined, after the fact, to have an anticompetitive effect.[16]

Shortly after *Gypsum* was decided, however, Professor Richard Posner criticized the Court's decision for missing the big picture—a fundamental distinction between the *price* and *output* of prices in the market in which the information exchange occurs.

for criminal liability but not for civil liability, which could have serious consequences for a defendant as well, namely, exposure that "could amount to be hundreds of millions of dollars."[20]

In view of the procompetitive benefits flowing from a narrowing of the dispersion of prices, as first recognized in *Mid-West Paper*, Professor Posner proposed in his article that "[a]

seemingly exclude competitor exchanges of price information, standing alone, from the ambit of criminal antitrust enforcement. In fact, however, that has not been the case. Why?

Although cartel enforcement remains the highest priority at the Antitrust Division (as it should),[25] in my view there is little "low-hanging fruit"—that is, the pure price-fixing conspiracies that take place in smoke-filled rooms—left in the stable of cases under investigation and prosecution. As a result, the Antitrust Division has been bringing more cases involving conduct in the "gray zone," such as exchanges of price information. The basic working theory, as seen in *Gypsum*, is that these exchanges are being made as part of an alleged agreement to fix

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http://www.justice.gov/atr/public/speeches/218336.pdf; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 2 (Apr. 2005 rev.) ("Price fixing, bid rigging, and market allocation are violations of Section 1 and generally are prosecuted criminally."), *id.* at http://www.justice.gov/atr/public/guidelines/209114.pdf; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (Sept. 28, 2005 rev.) ("Most criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes."), *id.* at http://www.justice.gov/atr/public/guidelines/211578.pdf; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIV. MANUAL ch. III.C.5 at III-20 (4th ed. July 2009 rev.) (providing an internal agency statement that "current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations"), *id.* at http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf; *cf. Gypsum*, 438 U.S. at 439-40 (reviewing the then prevailing statements of policy from the Attorney General of the United States and the Antitrust Division).

[25] *See, e.g.* Scott D. Hammond, Deputy Asst. Atty. Gen. for Criminal Enforcement, U.S. Dep't of Justice, Antitrust Div., Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Remarks before the ABA Section of Antitrust Law's 56th Annual Spring Meeting (Mar. 26, 2008), at 1 ("The detection, prosecution, and deterrence of cartel offenses remain the highest priority of the Antitrust Division."), *id.* at http://www.justice.gov/atr/public/speeches/232716.pdf; Thomas O. Barnett, Asst. Atty. Gen., U.S. Dep't of Justice, Antitrust Div., Seven Steps to Better Cartel Enforcement, Remarks before the European Union Institute's 11th Annual Competition Law and Policy Workshop (June 2, 2006), at 2 ("The most important step in prosecuting cartels, and particularly in deterring them, is to make clear to all that anti-cartel enforcement is a priority."), *id.* at http://www.justice.gov/atr/public/speeches/216453.pdf

prices.[26] Where such exchanges become the *bulk* of the Government's case, however, the prosecution runs the risk that the jury

Hamilton agreed and gave this sentence as part of her instructions: “It is not unlawful for a person to obtain information about a competitor’s prices or even to exchange information about prices unless done pursuant to an agreement or mutual understanding between two or more persons as charged in the indictment.”[30]

The trial resulted in a hung jury, and Swanson moved for judgment of acquittal, emphasizing the lack of any evidence about agreements or “mutual understandings” to fix prices, and the presence of only evidence about “regular pricing discussions” and other exchanges of information, which are not per se illegal.

be charged by the company and its competitors, a reasonable doubt exists as to whether the Government has really proven its case. I agree with Swanson's defense counsel that carefully crafted jury instructions are important in this regard—not only does the explanation of the crucial difference between lawful information exchanges and unlawful price-fixing carry the imprimatur of the district judge, but it also reinforces the points made by defense counsel during opening statement and closing argument.

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As a matter of law, the outcome in the Swanson case is consistent with

practice still has its risks. Fi

avoidable, in the context of collaboration agreements,[38] and instead, single out only the sharing of "certain technology, know-how, or other intellectual property" as an example of a procompetitive exchange in the context of an R&D collaboration.[39]

The Agencies' August 1996 Statements of Antitrust Enforcement Policy in Health Care[40] take a different, and somewhat inconsistent, approach to the exchange of price information, as compared to the Collaboration Guidelines. Instead of discouraging the exchange of price information, the Health Care Guidelines recognize that "[p]roviders can use information derived from price and compensation surveys to price their services more competitively and to offer compensation that attracts highly qualified personnel," and "[p]urchasers can use price survey information to make more informed decisions when buying health care services."[41] The Health Care Guidelines therefore set up an antitrust "safety zone" for third-party-mediated exchanges of

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[38] *Id.* § 3.31(b):

> Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operations and future business plans is more likely to raise concerns than the sharing of historical information.

[39] *Id.* § 3.31(b).

[40] U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care, Stmt. 6: Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information (Aug. 1996 rev. ed.), http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.pdf.

[41] *Id.*, Stmt. 6, at 1.

certain provider price and cost information,[42] and otherwise indicated that exchanges of information will be evaluated under a rule of reason.[43]

In January 2011, the European Union issued a revised set of guidelines on horizontal co-operation agreements that includes a new chapter on information exchanges.[44] In stark contrast to the U.S. Collaboration and Health Care Guidelines, the EU Guidelines address information exchanges in excruciating detail. However, the guidance provided is not any more encouraging of exchanges of price information.

As a general matter, the EU Guidelines treat exchanges of price information, standing alone, as a type of horizontal cooperation agreement.[45] Although the Guidelines recognize that information exchanges may have procompetitive benefits such as improving internal efficiency and reducing inventory for companies, and reducing consumer search costs and improving consumer choice,[46] the legality of such exchanges under Article 101 very much depends on the structural characteristics of the market affected and the type of information that is exchanged.[47] In particular, the EU Guidelines pay close attention to market characteristics that are likely to facilitate a collusive outcome based on an exchange of price information; such markets tend to

be "sufficiently transparent, concentrated, non-complex, stable and symmetric."[48] Thus, the more concentrated a market is, the riskier the exchange is, all other things being equal.

The EU Guidelines also attempt to draw a distinction between "strategic data," defined as data that reduce "strategic uncertainty" in the market, from other types of information because the former are viewed as decreasing the incentives to compete, and hence the decision-making independence, of companies in a given market.[49] As I see it, the problem with this approach is that the Guidelines cut too broad a swath. They describe "strategic information" as being "related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results," and regard information related to prices and quantities as "the most strategic, followed by information about costs and demand."[50] If firms were to refrain from exchanging "strategic information" on price or cost, heeding the caution from the Guidelines, then neither they nor the consumers may be able to realize the procompetitive benefits of such exchanges. This is not the kind of outcome that public law enforcement officers should want to achieve.

IV.

I want to turn next to benchmarking but before I do, let me say a few words about invitations to collude. As you may know, the Commission has challenged invitations to collude as violations of Section 5 of the FTC Act, as opposed to the Sherman Act. Most recently, we

[48] *Id.* ¶ 77.

[49] *Id.* ¶ 86.

[50] *Id.*

took this enforcement approach in the

companies to learn about more efficient means of production and distribution, which can in turn lead to better and lower cost products for consumers. But benchmarking, like other forms of information exchange, can lead to tacit or even explicit collusion.

One of the few litigated benchmarking cases is *Todd v. Exxon* from the Second Circuit.[53] The plaintiff in that case alleged that fourteen petroleum companies had violated Section 1 of the Sherman Act by regularly sharing detailed information regarding compensation to nonunion managerial, professional, and technical employees as well as current and future salary budgets for these employees. The plaintiff alleged that these benchmarking exercises had the purpose and effect of depressing salaries paid by defendants. In antitrust speak, it was a monopsony, or oligopsony, case. The suit alleged that Exxon alone was able to lower its salaries by $20 million a year.

The district court granted the defendants' motion to dismiss but the Second Circuit, in an opinion written by then-Judge Sotomayor, reversed. The court of appeals explained that the legality of the benchmarking activities of the defendants was controlled by the information-sharing cases that I've previously discussed, in particular *Container Corp*. The court read those cases to say that the defendants' conduct should be analyzed under the full rule of reason, under which a court should focus on "the structure of the industry involved and the nature of the information exchanged."[54]

To determine the susceptibility of the industry to tacit collusion, the Second Circuit focused on the degree of concentration, the fluidity of the plainti

elasticity of demand. While acknowledging that the industry might not be viewed as concentrated under the Merger Guidelines, the court found that the number of defendants and their market concentration was comparable to those in another Supreme Court case. The court found that the jobs in question were sufficiently fungible in light of "the sophisticated techniques employed by defendants to account for the differences among jobs."[55] As to demand, with little discussion, the court found that the supply of labor is "a classic example of inelastic supply flow."[56] In short, the court found that all three factors indicated that the market was susceptible to collusion, particularly in light of the sophistication of the defendants.

The Second Circuit then considered the anticompetitive potential of the information exchange, relying on four factors. The first is the timeframe of the data. The court noted that "'exchanges of current price information . . . have the greatest potential for generating anti-competitive effects and although not per se unlawful have consistently been held to violate the Sherman Act.' The exchange of past price data is greatly preferred because current data have greater potential to affect future prices and facilitate price conspiracies."[57]

The second consideration is the specificity of the information. As the court explained: "Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices. Courts prefer that information be aggregated in the form of industry averages, thus avoiding transactional specificity."[58]

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[55] *Id.* at 210.

[56] *Id.* at 211.

[57] *Id.* at 211 (quoting *Gypsum*, 438 U.S. at 441 n.16).

[58] *Id.* at 212 (citations omitted).

The third consideration is whether the information is made publicly available. According to the court, "[p]ublic dissemination is a primary way for data exchange to realize its pro-competitive potential."[59] When both buyers and sellers have access to information, the market will function more efficiently.

The fourth consideration is the context in which the information is exchanged. Frequent meetings between competitors to discuss the results of the information exchange can lead to an explicit collusion or uniformity with regard to the benchmarked metric.[60]

In this case, the Second Circuit found that all four factors suggested that the information exchange was anticompetitive. The complaint alleged that the defendants exchanged not only past salary information but also current and future salary data. The court was also troubled by the specificity of the data: some information was company specific, while other information was aggregated to just three companies, making it fairly easy to detect any deviations from a purported agreement on salaries. The information "was not disclosed to the public nor to the employees" at issue, which hindered employees from bargaining "'intelligently and competitively with the members of the information exchange.'"[61] Finally, the court noted its concern that the defendants participated in "frequent meetings" where they discussed the salary information and assured each other that they would use the data to help set their salaries.[62]

That the data was compiled by a third party – ordinarily a mitigating factor – was not discussed by the court. And perhaps because the posture of the case was a 12(b)(6) motion, the

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[59] *Id.* at 213.

[60] *Id.*

[61] *Id.* at 213 (quoting Complaint ¶ 3).

[62] *Id.* at 213.

court did not consider potential efficiencies of

labor markets for the individual plaintiffs are not necessarily limited to the oil and petrochemical industry and in fact vary based upon the individual's qualifications and experience."[67] In 2009, the parties settled for an undisclosed sum.

What should we take away from

reason, which typically results in a win for defendants. Finally, I think it is noteworthy that the litigation lasted twelve years – no small amount of time for a plaintiff's attorney to invest in a case – and ultimately lead to a defense victory.

Arguably, a final lesson from *Toledo* is that actions of buyers may be subject to the same level of antitrust scrutiny as those of sellers.[69] This is a teaching with which I respectfully disagree. In my view, the antitrust laws should be limited to protecting consumers – and by "consumers" I mean the people who purchase the final product or service.[70] Accordingly, antitrust liability should not attach to buy-side behavior unless it causes an adverse effect on consumers in the downstream market. From my perspective, the lack of any allegation that the oil companies' conspiracy affected the price or quantity of any final petroleum products should have been fatal to plaintiffs' case.

VI.

Perhaps because cost benchmarking exercises are procompetitive, the Commission investigates these practices somewhat infrequently. Perhaps the best known FTC benchmarking case was the GM/Toyota joint venture back in the 1980s; although, I suspect that few people remember the benchmarking aspect of this case.

Let me start with a little background. In 1984, the Commission gave qualified approval to a production joint venture between GM and Toyota, which at the time were the largest and

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[69] *Id.* at 201 ("The Sherman Act, however, also applies to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony. Plaintiff is correct to point out that a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers." (citation omitted)); *id.* at 214 ("In an oligopsony, the risk is that buyers will collude to depress prices, causing harm to sellers.").

[70] I have discussed my views on this point in more detail before. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Monopsony and The Meaning of "Consumer Welfare": A Closer Look at *Weyerhaeuser*, Remarks before the Milton Handler Annual Antitrust Review (Dec. 7, 2006), http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf

third largest automobile companies in the world. The companies set up a plant in Northern California to build Chevy Geo Prizms and Toyota Corollas. One of the goals of the venture was a mutual education process in which Toyota would gain experience producing vehicles with a U.S. labor force and GM would become familiar with more efficient Japanese manufacturing techniques.[71]

The proposed joint venture was subject to one of the most rigorous antitrust investigations in history. The agency focused on two concerns: the venture's effect on GM's incentives to produce small cars at other plants, and the possibility of anticompetitive information exchanges that were unnecessary to achieve the legitimate purposes of the joint venture.

The parties entered into a consent agreement that permitted the joint venture to proceed with restrictions. The first concern was addressed by limiting the number and type of vehicles to be produced, as well as the duration of the venture.[72] As to the second concern, "[t]o ensure that the joint venture [was] not used to facilitate the exchange of competitively sensitive information unnecessary to its operation, the exchange of certain information was prohibited, and record-keeping and reporting requirements concerning exchanges of other information were imposed to

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[71] *See* Thomas B. Leary, Comm'r, Fed. Trade Comm'n, Efficiencies and Antitrust: A Story of Ongoing Evolution, Prepared Remarks at the ABA Section of Antitrust Law Fall Forum (Nov. 8, 2002) *at* http://www.ftc.gov/speeches/leary/efficienciesandantitrust.shtm; General Motors Corp., 103 F.T.C. 374 (1984) (statement of Chairman Miller) ("[T]he joint venture offers a valuable opportunity for GM to complete its learning of more efficient Japanese manufacturing and management techniques.").

[72] General Motors Corp., 103 F.T.C. 374 (1984). This consent order limited the Joint Venture between General Motors Corporation and Toyota Motor Corporation to the manufacture and sale of no more than 250,000 subcompact cars per year, for a period of twelve years, ending no later than Dec. 31, 1997.

ensure continued, close monitoring of the ventures' future operations.[73] Specifically, the order limited the exchange of non-public information concerning prices and costs of GM or Toyota cars or parts, sales or production forecasts, and market003 Tb-ansforeandypro,diion ,the e]TJ 0.0004

letters. For example, in 1994, the Division entered into a consent decree to resolve its concerns that several hospitals in Salt Lake County, Utah conspired to restrain wage competition through the use of a salary benchmarking survey.[77] The Division alleged that the hospitals exchanged current and prospective non-public compensation information for registered nurses, which had the effect of depressing their wages. The final judgment enjoined the defendants from exchanging current and prospective wage and budget information, except under limited circumstances.

It appears that no topic has generated more business review requests than benchmarking and other forms of information exchange.[78] For example, in April 2007, the Division said it had no intention to challenge a plan by the National Association of Small Trucking Companies "to conduct an operational and financial survey of small- and medium-sized trucking companies and then share the collected information in aggregate form with survey participants and nonparticipants 'to enable them to benchmark themselves against the aggregate[6w - -0.e0ed the i Tdfa3 T

to reduce their operating costs."[79] The survey included the number of tractors, trucks, and drivers; driver turnover rate and compensation; and a variety of operating capacity metrics. In its Business Review Letter, the Division observed that benchmarking exercises often offer significant pro-competitive potential:

> Participation by members of an industry in benchmarking surveys does not necessarily raise antitrust concerns. In fact, with appropriate safeguards, such surveys can benefit consumers when industry members use information derived from such surveys to gain efficiencies and price their products or services more competitively.[80]

The Division concluded that there was little risk of harm from the Trucking survey because it would be administered by a third party; individual company information would be kept confidential; the published report would contain information aggregated from a minimum of five companies on a national basis; and the published information would be at least three months old. The letter also observed that the trucking industry did not appear to be concentrated or have significant barriers to entry.

VII.

So far in my remarks, I have focused on the antitrust implications of information exchanges and benchmarking. I want to point out, however, that there can also be consumer protection issues from these exercises as well. In the Intel case, the Commission alleged that the company failed to disclose to benchmarking organizations and consumers that the compiler it released in 2003 skewed the performance results of non-Intel CPUs.[81] OEMs and consumers

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[79] Department of Justice Business Review Letter to the National Association of Small Trucking Companies and Bell & Company (Apr. 9, 2007), http://www.justice.gov/atr/public/busreview/222533.htm

[80] *Id.*

[81] Complaint ¶¶ 10, 56-71, 103, Intel Corp., FTC Dkt. No. 9341 (Dec. 16, 2009), http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

rely on these benchmarking organizations to judge the performance of competing CPUs. Intel promoted its systems' performance under these benchmarks as realistic measures of typical or